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THE MINNESOTA RATE CASES

WALTER BAGEHOT has said that "a constitution is a collection of political means for political ends, and if you admit that any part of a constitution does no business, or that a simpler machine would do equally well what it does, you admit that this part of the constitution, however dignified or awful it may be, is nevertheless in truth useless." [1] While it cannot be said that any part of our federal Constitution "does no business," it can be affirmed that there are three of its organs that are now doing so much more than any other that each stands forth as a distinct force incased in a distinct and growing literature of its own. Around the Contract clause of the Constitution a distinct literature has grown up whose beginnings are to be found in the Dartmouth College case. Around the first section of the Fourteenth Amendment a distinct literature has grown up whose beginnings are to be found in the Slaughter House cases. Around the Commerce clause, which vests in Congress the power "to regulate commerce with foreign nations and among the several states, and with the Indian tribes," a distinct literature has grown up whose beginnings are to be found in the famous case of Gibbons *v.* Ogden, in which the power of Congress to regulate commerce was first defined. It is no exaggeration to say that the three great streams of judge-made law which have been for a long time flowing from the Supreme Court into our national life through the three channels just defined have been and are the unifying and systematizing forces that have made a real national life possible. Through their reciprocal action has been realized Marshall's dream:

"That the United States form, for many and for most important purposes, a single nation has not yet been denied. In war we are one people. In making peace we are one people. In all commercial relations we are one and the same people. In many other respects the American people are one. And the government which is alone capable of controlling and managing their interests in all these respects is the

[1] Bagehot, The English Const. 4.

government of the Union. It is their government, and in that character they have no other. America has chosen to be, in many respects, and to many purposes, a nation; and for all these purposes her government is complete; to all these objects it is competent. The people have declared that in the exercise of all powers given for these objects it is supreme. It can, then, in affecting these objects, legitimately control all individuals or governments within the American territory. The constitution and laws of a state, so far as they are repugnant to the Constitution and laws of the United States, are absolutely void. These states are constituent parts of the United States. They are members of one great empire, — for some purposes sovereign, for some purposes subordinate." [2]

Within the domain of reserved state powers is included, said the great Chief Justice,

"that immense mass of legislation which embraces everything within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State." [3]

That reserved power of a state to regulate its internal commerce has recently received a notable and far-reaching recognition in the unanimous judgment rendered by the Supreme Court of the United States, speaking through Mr. Justice Hughes, in the Minnesota Rate Cases; wherein it was held that, subject to certain limitations,

"there necessarily remains to the states until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending federal intervention. . . . Further, it is competent for a state to govern its internal commerce, to provide local improvements, to create and regulate local facilities, to adopt protective measures of a reasonable character in the interest of the health, safety, morals, and welfare of its people, although interstate commerce may incidentally or indirectly be involved. Our system of government is a practical adjustment by which the national authority as conferred

[2] Cohens *v.* Virginia, 6 Wheat. [U. S.] 264 [1821].
[3] Gibbons *v.* Ogden, 9 Wheat. [U. S.] 1 [1824].

by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the state appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of federal power. . . . And whenever, as to such matters, under these established principles, Congress may be entitled to act, by virtue of its power to secure the complete government of interstate commerce, the state power nevertheless continues until Congress does act and by its valid interposition limits the exercise of the local authority. (2) These principles apply to the authority of the state to prescribe reasonable maximum rates for interstate transportation. . . . If this authority of the state be restricted, it must be by virtue of the paramount power of Congress over interstate commerce and its instruments; and, in view of the nature of the subject, a limitation may not be implied because of a dominant federal power; that is, one which has not been exerted, but can only be found in the actual exercise of federal control in such measure as to exclude this action by the state which otherwise would clearly be within its province. . . . The question we have now before us, essentially, is whether after the passage of the interstate commerce act, and its amendment, the state continued to possess the state-wide authority which it formerly enjoyed to prescribe reasonable rates for its exclusively internal traffic. That, as it plainly appears, was the nature of the action taken by Minnesota, and the attack, however phrased, upon the rates here involved as an interference with interstate commerce, is in substance a denial of that authority."

In solving the weighty problem thus submitted to it, the court recognized the fact that "The controversy thus arises from opposing conceptions of the fundamental law, and of the scope and effect of federal legislation, rather than from differences with respect to salient facts." Those who represented the state contended that "there is practically no movement of traffic between two towns within a state that does not come into competition with some interstate haul," and that "if the disturbance of the existing relation between competitive state and interstate rates is the correct criterion, no reduction can be made in state rates without interfering with interstate commerce." They assailed the decision of the court below, not upon the ground that it incorrectly set forth

the conditions in Minnesota and adjoining states, but because of "its plain disregard of the provisions of the federal Constitution, which establish the relations between the nation and the state." The operation of such provisions, they maintained, "was not made to depend upon geography or convenience or competition. They cannot apply in one state and not in another, according to circumstances as they may be found by the courts, because they are vital principles which constitute the very structure of our dual form of government." In that way the court was forced to begin its opinion with a review of the history of the commerce clause of the Constitution, the product of a hopeless condition which "sprang from the disastrous experiences under the confederation, when the states vied in discriminatory measures against each other." Who can doubt that against such mighty forces, all making for disunion, the new national spirit embodied in the existing constitution would have been powerless, despite its nationalizing machinery operating directly on individuals, had it not been for the unifying force of rapid intercommunication? Without the steamboat, the locomotive engine, and the telegraph, existing conditions would have been impossible. A revolution was wrought in the travel and commerce of this country through a transition from the primitive and ineffectual means of transportation by pack-horse, stage, and wagon to the new methods resulting from the application of steam to locomotion on land as well as water. When in 1824 the time came for the Supreme Court to construe the commerce clause in the famous case of Gibbons *v.* Ogden, it appeared that Chancellor Kent had granted an injunction restraining Gibbons from navigating the Hudson River by steamboats only licensed for the coasting trade under an act of Congress, on the ground that he was thereby infringing the exclusive right granted by the state of New York to Robert Fulton and Livingstone, and by them assigned to Ogden, to navigate all the waters of the state with vessels moved by steam. But that claim in favor of monopoly backed by state power went down before a judgment holding that Congress had exclusive authority to regulate commerce in all its forms, on all the navigable waters of the United States, including bays, rivers, and harbors; free from monopoly, restraint, or interference by state legislation; that the term "commerce" meant, not only traffic, but intercourse; that it included navigation; therefore the power to regulate com-

merce included the power to regulate navigation. It was admitted that it did not include commerce purely internal; and the point was left undecided whether the power of Congress to regulate commerce was exclusive only when exercised, or whether a state might exercise it in the absence of action by Congress. Thus was established "that freedom of commerce between the states," which, in the words of Mr. Justice Brewer, "perhaps more than any one thing, has wrought into the minds of the people the great thought of a single controlling nationality." In 1847 arose the License Cases,[4] in the first two of which the construction of the commerce clause was involved with the question whether, in the presence of an act of Congress authorizing the importation from foreign countries of wines and spirits, a state might assume to prohibit or regulate their sale at retail; and in the last with the question whether, in the absence of an act of Congress to regulate such importation, a state might prohibit by law the sale of liquor imported from another state. In the last, a diversity of opinion arose as to the question whether, in the absence of an act of Congress regulating commerce between the states, all state laws on the subject were null and void. In other words, whether the mere grant of power to Congress could be construed an absolute prohibition of the exercise of any power over the same subject by the states. Despite such a grant, in the opinion of the Chief Justice, "the state may nevertheless, for the surety and convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbors, and for its own territory; and such regulations are valid, unless they come in conflict with the laws of Congress." The decision in Pierce *v.* New Hampshire was, however, distinctly overruled in Leisy *v.* Hardin,[5] known as the Original Package case, in which it was held that, as the grant of power to regulate commerce among the states is exclusive, "the states cannot exercise that power without the assent of Congress; and in the absence of legislation, it is left to the courts to determine when state action does or does not amount to such exercise, or in other words, what is or is not a regulation of such commerce." In Cooley *v.* Port Wardens[6] a Pennsylvania statute regulating

[4] Thurlow *v.* Mass., 5 How. [U. S.] 504.

[5] 135 U. S. 100 [1889].

[6] 12 How. [U. S.] 300 [1851].

pilots and pilotage, and providing that a vessel neglecting or refusing to take a pilot should pay and forfeit certain sums to a society for the relief of pilots, was held not to be in conflict with the article of the Constitution prohibiting states from imposing imposts and duties on imports, exports, and tonnage, because those subjects are distinct from fees and charges for pilotage, and from the penalties by which commercial states enforce their pilotage laws. In 1877 the Supreme Court, in citing and still further developing the principles announced in Gibbons *v.* Ogden fifty-three years before, held in Pensacola Teleg. Co. *v.* Western Union Teleg. Co.,[7] that a telegraph company bears the same relation to commerce as a carrier of goods, and that the powers of Congress are not confined to the instrumentalities of commerce known or in use when the Constitution was adopted.

Such were the landmarks defining the separate domains of intrastate and interstate commerce prior to the enactment of "An Act to regulate commerce," approved February 4, 1887, by which the Interstate Commerce Commission was created. When that Act was passed the case of California *v.* Central Pacific R. Co.[8] was pending, in which was finally settled the right of Congress to grant charters for the construction of railroads in any state without its consent, a right never asserted prior to the act to facilitate commercial, postal, and military communication among the several states, approved June 15, 1866. By that Act was greatly accelerated the process through which commerce, including transportation, has been revolutionized by the establishment and rapid growth of inland facilities of distribution and sharpness of competition between trade centers, incident to the annihilation of distance through the increased speed of trains, as well as by the greatly increased capacity of engines and cars. It was the establishment of the great railway systems of continuous lines, unknown in the first decade of railway construction, that forced Congress in 1887 to organize the regulating power which down to that time lay practically dormant. In the first case in which the act of 1887 was construed, the court said that prior to its enactment,

"railway traffic in this country was regulated by the principles of the common law applicable to common carriers, which demanded little more

[7] 96 U. S. 1 [1877].

[8] 127 U. S. 1 [1887].

than that they should carry for all persons who applied in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable. It was even doubted whether they were bound to make the same charge to all persons for the same service."

In Reagan *v.* Farmers' Loan & Trust Co.[9] it was held that although the formation of a tariff of charges for transportation by a common carrier is a legislative or ministerial rather than a judicial function, the court may decide whether or not such rates are unjust and unreasonable and such as to work a practical destruction of rights of property, and if found so to be may restrain their operation; that the fixing and enforcement by a railroad commission of unjust and unreasonable rates for transportation by railroad companies is an unconstitutional denial of the equal protection of the laws; that a schedule of rates made by railroad commissioners being challenged as a whole, the court must either condemn or sustain it as a whole and cannot rearrange it or prepare a new schedule. After the commission had undertaken during many years to prescribe rates for the future, under the terms of the original Act, its right to do so was questioned, and the Supreme Court held it had no such right.[10] The conclusion of the court was condensed into the statement that "it is one thing to inquire whether the rates which have been charged and collected are reasonable, — that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future, — that is a legislative act."

In Louisville, N. O. & T. R. Co. *v.* Mississippi[11] the line between interstate and intrastate commerce was thus drawn:

"It has often been held in this court, that there can be no doubt about it, that there is a commerce wholly within the state, which is not subject to constitutional provision, and the distinction between commerce among the states and the other class of commerce between the citizens of a single state, and conducted within its limits exclusively, is one which has been fully recognized in this court, although it may not be always easy, where the lines of these classes approach each other, to distinguish between the two."

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[9] 154 U. S. 362 [1893].

[10] Interstate Commerce Com. *v.* Baltimore & O. R. Co., 145 U. S. 263 [1891].

[11] 133 U. S. 587 [1889].

Reference is then made to Stone *v.* Farmers' Loan & Trust Co.,[12] in which it was held that a state has power to limit railroad charges for transportation within its own jurisdiction, unless restrained by contract, or the power of Congress to regulate foreign or interstate commerce; and that the power can only be bargained away, if at all, by words of positive grant, or their equivalent. In Munn *v.* Illinois,[13] defining the extent of a state's police power, a statute of that state fixing the maximum charges for the storage of grain in warehouses in Chicago and other places in the state was held valid, as a mere common-law regulation of trade or of business, not in violation of the limitations upon the legislative power of the state imposed by the federal Constitution. An important statement of the relation between the police power of a state and the power of Congress to regulate interstate commerce is contained in Louisville & N. R. Co. *v.* Kentucky,[14] wherein it was held that the prohibition by a state of the consolidation of parallel and competing lines of railway is not interference with the power of Congress over interstate commerce. In Pullman Co. *v.* Adams [15] it was held that the privilege tax imposed by Mississippi on sleeping and palace car companies carrying passengers from one point to another within the state cannot be deemed an unconstitutional regulation of commerce. In Patapsco Guano Co. *v.* North Carolina Board of Agriculture [16] it was held that interstate as well as foreign commerce is subject to state inspection laws. In Crossman *v.* Lurman [17] it was held that the New York statute forbidding the sale of adulterated food and drugs is not repugnant to the commerce clause, but is a valid exercise of the police power of the state. In Bartemeyer *v.* Iowa [18] it was held that the right to sell intoxicating liquors is not one of the privileges and immunities of a citizen of the United States which, by the Fourteenth Amendment, a state is forbidden to abridge; and at a little later day it was held in Mugler *v.* Kansas [19] that a state law prohibiting the manufacture within its limits of intoxicating liquors, to be sold and bartered for general use as a beverage, was not necessarily an infraction of the Constitution, because the Fourteenth Amendment does not deprive a state of

[12] 116 U. S. 307 [1885].
[13] 94 U. S. 113 [1876].
[14] 161 U. S. 677 [1895].
[15] 189 U. S. 420 [1901].
[16] 171 U. S. 345 [1897].
[17] 192 U. S. 189 [1903].
[18] 18 Wall. [U. S.] 129 [1873].
[19] 123 U. S. 623 [1887].

the police power to determine primarily what measures are needful for the protection of the public morals, health, and safety. Thus it appears that the exclusive power of the federal government to regulate interstate commerce has not annihilated the power of the state (1) to exercise its police power, within proper limits, over all commerce, interstate as well as foreign; (2) to exercise its control, subject to certain limitations, over all commerce really intrastate. In the Act to Regulate Commerce as amended up to June 18, 1910, it is expressly provided

"that the provisions of this Act shall not apply to the transportation of passengers or property, or to receiving, delivering, storage, or handling of property wholly within one state and not shipped to or from a foreign country from or to any state or territory as aforesaid, nor shall they apply to the transmission of messages by telephone, telegraph, or cable wholly within one state and not transmitted to or from a foreign country or to any state or territory as aforesaid."

Such is the essence of the outcome of a twenty-five years of construction of the Interstate Commerce Act of 1887 at the hands of the commission and the federal courts, all of which must be considered in connection with the amendments made by Congress during that tentative period, so numerous that a mere catalogue of their titles occupies two printed pages octavo. In that vast literature, consisting of statutes and judge-made law, nothing is more lucid, more practical, than the following statement made by Mr. Justice Field in his concurring opinion in Bowman *v.* Chicago & Northwestern R. Co.,[20] in which he thus runs the line between state and federal power:

"That when the subject upon which Congress can act under its commercial power is local in its nature or sphere of operation, such as harbor pilotage, the improvement of harbors, the establishment of beacons and buoys to guide vessels in and out of port, the construction of bridges over navigable rivers, the erection of wharves, piers, and docks and the like, which can be properly regulated only by special provisions adapted to their localities, the state can act until Congress interfere and supersedes its authority; but where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the states, such as transportation between the states, including the impor-

[20] 125 U. S. 465 [1887].

tation of goods from one state to another, Congress can alone act upon it, and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free. Thus the absence of regulations as to interstate commerce with reference to any particular subject is taken as a declaration that the importation of that article into the state shall be unrestricted. It is only after the importation is completed, and the property is mingled with and becomes a part of the general property of the state, that its regulations can act upon it, except so far as may be necessary to insure safety in the disposition of the import until thus mingled."

After a minute and masterful review of the supreme power vested in Congress to regulate commerce, foreign and domestic, prior and subsequent to the "Act to Regulate Commerce," approved February 4, 1887, the court in the Minnesota Rate Cases declared with all possible emphasis that, from the beginning, the fact has always been recognized

"that there is a commerce wholly within the state, which is not subject to the constitutional provision, and the distinction between commerce among the states and the other class of commerce between the citizens of a single state, and conducted within its limits exclusively, is one which has been fully recognized."

In its review of that branch of the case, the court took occasion to say that state regulation of railroad rates began with railroad transportation. That the authority of the state to limit by legislation the charges of common carriers within its borders was not confined to the power to impose limitations in connection with grounds of corporate privileges; that it became a frequent practice for the states to create commissions, as agencies of state supervision and regulation, and in many instances the rate-making power was conferred upon such bodies; that while the authority of the state could not be extended to the regulation of charges for interstate commerce, its authority to "fix reasonable intrastate rates through its own territory" was put beyond all question; that it has never been doubted that the state could, if it saw fit, build its own highways, canals, and railroads; that it could build railroads traversing the entire state, and thus join its border cities and commercial centers by new highways of internal intercourse,

to be always available upon reasonable terms; and above all it held that

"Such provision for local traffic might indeed alter relative advantages in competition, and, by virtue of economic forces, those engaged in interstate trade and transportation might find it necessary to make readjustments, extending from market to market through a wide sphere of influence; but such action of the state would not for that reason be regarded as creating a direct restraint upon interstate commerce, and as thus transcending the state power. . . . As a power appropriate to the territorial jurisdiction of the state, it is not confined to a part of the state, but extends throughout the state, — to its cities adjacent to its boundaries as well as to those in the interior of the state. To say that this power exists, but that it may be exercised only in prescribing rates that are on an equal or higher basis than those that are fixed by the carrier for interstate transportation, is to maintain the power in name while denying it in fact."

After having thus defined, with minute precision, the ultimate question before it, the court solved it in these terms:

"To suppose, however, from a review of these decisions, that the exercise of this acknowledged power of the state may be permitted to create an irreconcilable conflict with the authority of the nation, or that, through an equipoise of powers an effective control of interstate commerce is rendered impossible, is to overlook the dominant operation of the Constitution, which, creating a nation, equipped it with an authority supreme and plenary, to control national commerce, and to prevent that control, exercised in the wisdom of Congress, from being obstructed or destroyed by any opposing action. But, as we said at the outset, our system of government is a practical adjustment by which the national authority, as conferred by the Constitution, is maintained in its full scope without unnecessary loss of local efficiency. It thus clearly appears that, under the established principles governing state action, the state of Minnesota did not transcend the limits of its authority in prescribing rates here involved, assuming them to be reasonable intrastate rules. It exercised an authority appropriate to its territorial jurisdiction, *and not opposed to any action thus far taken by Congress.*"

Such was the path by which the court reached the following conclusions: first, that the failure of Congress to act on the subject leaves each state free to establish maximum intrastate rates for interstate carriers which are reasonable in themselves, although

the state's requirements may necessarily disturb the existing relation between intrastate and interstate rates as to places within zones of competition crossed by the state boundary line;[21] second, that the states continued to possess the right to prescribe reasonable rates for the exclusively internal traffic on interstate carriers after the passage of the interstate commerce act of 1887, and the amendment of June 29, 1906, although it may be that by reason of the interblending of the interstate and intrastate operations of such carriers adequate regulation of interstate rates cannot be maintained without imposing requirements with respect to their intrastate rates which substantially affect the former; third, that the question whether an undue or unreasonable preference or advantage to any locality forbidden by the interstate commerce act of 1887 arises from the operation of an intrastate rate as compared with an interstate rate, or whether any locality is thereby subjected to an undue or unreasonable prejudice or disadvantage, would be primarily for the investigation and determination of the Interstate Commerce Commission, and not for the courts, — assuming that such a case is within the statute. The status thus defined by existing laws, state and federal, says the court, is

"*not opposed to any action thus far taken by Congress.* . . . It is the function of this court to interpret and apply the law already enacted, but not, under the guise of construction, to provide *a more comprehensive scheme of regulation than Congress has decided upon.* Nor, in the absence of federal action, may we deny effect to the laws of the state enacted within the field which it is entitled to occupy, *until its authority is limited through the exertion by Congress of its paramount constitutional power.*"

With these emphatic declarations that Congress may, at its pleasure, so exercise "its paramount constitutional power" as to enact "a more comprehensive scheme of regulation" of the entire subject matter, such a scheme as may destroy the entire status as de-

[21] After referring in its opinion to interstate rates as those "fixed by the carrier for interstate transportation," the court makes a comparison between rates as prescribed by the state authority and those prescribed by the carrier. It then indulges in a presumption of reasonableness as to the state rate on the question of interference, but indulges in no such presumption as to the interstate rate. Considering the supervision of the Interstate Commerce Commission over interstate rates, should there not be a presumption of reasonableness of those rates? The court has been very careful to avoid any clash between the two presumptions.

fined by existing laws, — the court has transferred the problem of problems from the judicial to the political arena. Thus the burden has been cast upon our constructive legislators in Congress to devise such a new interstate commerce act as will be capable of adjusting all of the conflicting interests with which the court says it has no authority to deal. If the state railroad commissions as a whole should undertake to use their freshly defined powers in a radical and drastic spirit, and in such a way as *to disjoint the interstate system of rates as a whole*, a more comprehensive and far-reaching interstate commerce act, occupying the entire domain of federal power as defined by the court, might suddenly become a national necessity. It is therefore difficult to withhold a conjecture as to what would have been the result had the court set aside the state rates as an interference with interstate commerce. Possibly the day will come when such a result will be reached under a new interstate commerce act so drawn as to occupy the entire domain of federal power as the court has defined it.

The form of the judgment as prepared by Mr. Justice Hughes is as admirable as its substance. In it there is a happy blending of the scientific with the practical, of weightiness of thought with perfect lucidity of expression. He states the case with such precision, eliminating all irrelevancies of fact, and bringing out the essential matter in such bold relief in accordance with the legal principles it involves, as to carry conviction by sheer statement without argument. The ex-Governor of New York has seized upon a rare opportunity to erect for himself an enduring monument in a unique body of judicial literature built up by a line of jurists, a few of whom are destined to stand out in the time to come as the peers of Julianus, Gaius, Papinian, Tribonian, Portalis, Mansfield, and Rudolph Sohm.

Hannis Taylor.

WASHINGTON, D. C.